IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 23

PATRICIA WALDRON, as Executrix of the Last Will and Testament of GERALD B. WALDRON, Deceased,
Petitioner,

v.

CITIES SERVICE CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INDEX

CITATIONS

Cases:

Statutes:

Miscellaneous:

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REPLY BRIEF FOR THE PETITIONER

I.

Cities ignores the key facts and issues.

Cities' brief ignores the central issue of this case: whether Cities in 1952 joined the other defendants in their boycott of plaintiff and others who dealt in Iranian oil. Cities has avoided the conspiracy issue from the time it moved for summary judgment by deliberately withholding the affidavit of W. Alton Jones, the person who knew all the facts concerning Cities' involvement with plaintiff and Iran and, instead, submitting the affidavit of George H.

Hill, Jr., a lawyer who had never met plaintiff and who knew nothing of Cities' dealings with the Iranian oil industry.

When Cities moved for summary judgment it was required by rule 56 to submit an affidavit by an officer having knowledge of the facts, denying Cities' participation in the conspiracy alleged in the complaint. Had Cities attempted to satisfy this requirement, plaintiff would then have been entitled to examine that officer to determine the facts upon which the denial was made. In Cities' case, that officer was Jones. Cities failed to submit Jones' affidavit and failed to deny the conspiracy. Instead, Hill's affidavits were submitted, with the result that, although plaintiff wanted to examine Jones, the district court limited plaintiff to an examination of Hill on the evidentiary issues of Kuwait and the Consortium, the only matters dealt with in Hill's affidavits. With Jones' death in 1962, plaintiff was deprived of the examination of the one officer who knew whether Cities conspired. Thus Cities reaped the benefit of having failed to satisfy its initial burden.

It is no answer to say that plaintiff has examined the Cities employees he specified who were "still alive" at the time examination was permitted (Resp. Br. p. 90). Those belated examinations were so restricted that adequate disclosure of the facts was impossible (see Petitioner's Br. pp. 31-39). Discovery of other defendants, repeatedly sought, was not even permitted. The refusal to produce Jones when he should and could have been produced requires that plaintiff be given full, not restricted, discovery of Cities and of each of the other defendants and witnesses with whom Jones was in contact in order that plaintiff may piece together the complete circumstances of the conspiracy.

Illustrative of Cities' failure to come to grips with the issue of conspiracy is its failure to make any reference in its brief to the fact, admitted by one of its officers, that

Cities was threatened with a loss of its supply of oil if it should continue its Iranian oil venture (R. 5034; Petitioner's Br. pp. 18-19). The events of the American Petroleum Institute convention, which Cities chooses to call "peripheral assertions" (Resp. Br. pp. 59-60), when coupled with the fact that Cities responded to the threat by ending any further thought of securing a long-term supply of Iranian oil through the vehicle of plaintiff's contract (Petitioner's Br. pp. 18-19) and the fact that, after announcing its support for the cartel, Cities signed an agreement to purchase Kuwait oil from Gulf Oil Corp., one of the co-conspirators (*id.* at 19-20), themselves raise triable issues concerning Cities' motive for dropping the Iranian proposal sufficient to justify denial of the motion for summary judgment. These facts require that plaintiff be given full discovery of all the actors and documents involved. The order of July 9, 1964 allowed no inquiry concerning contacts between Cities and other defendants after October 1, 1952, thus foreclosing plaintiff from learning what happened at the American Petroleum Institute convention in November 1952. No effort by Cities to justify the district court's refusal to permit plaintiff such discovery is, or can be, made. Cities' only recourse is to ignore the matter.

Plaintiff is not concerned, as Cities' suggests, with the absence of a mere formal pleading (Resp. Br. p. 74). What does concern plaintiff is that Cities failed to produce Jones, the man who knew what happened, and that Cities has steadfastly refrained from denying by any sworn statement or testimony that it joined the conspiracy. Having permitted Cities to suppress strong, firsthand evidence—Jones' testimony and records —and accepted limited and secondhand evidence in its place, the court compounded

its error by refusing to allow plaintiff to examine persons having knowledge of the facts and then entering summary judgment against him for failure to set forth those facts.

II.

Cities' argument rests on a jumble of misleading labels and is refuted by the record.

Cities' brief should be labelled *"Caveat Lector,"* for, in truth, it is no more than a clever mixture of labels and distortions. The technique is to take several isolated facts, call each one a "theory," give each "theory" a label, and then assert that the "theories" were advanced and then abandoned by plaintiff one after the other over the years. The trouble with the technique is that the record refutes it.

On page 76 of Respondent's Brief, for example, the following statement is made:

> "Indeed, it was not until over a year after Jones had died, that petitioner invented the turnabout or change-of-heart theory and amended his complaint."

The statement is made in an effort to convince the Court that plaintiff did not advance a "theory" under which he sought to examine Jones until after Jones had died. No citation to the record in support of the statement is made, nor could any be made, for the statement is contrary to fact.

Cities' own characterization of the so-called "turnabout theory" is found on pages 24-27 of Respondent's Brief. There, on pages 25-26, Cities quotes a passage from the oral argument in the district court, in which plaintiff's

counsel explained that his case against Cities was based upon Cities' turning away from the opportunity to participate in Iran and joining the other defendants in their conspiracy to boycott those who dealt in Iranian oil. In that argument, the court referred to the conspiratorial behavior of Cities as "turnabout" (Tr. Vol. III, 108). This is the argument which Cities asserts was "invented" "over a year after Jones had died." (Resp. Br. p. 76.) *Cities fails to mention that the argument which it quotes occurred on May 9, 1960, two years before Jones died!* (Tr. Vol. III, 32, 108.)

Cities also fails to tell the Court that during the same argument on May 9, 1960, plaintiff's counsel specifically requested discovery of Cities and urged (Tr. Vol. III, 118):

"The place to begin is with W. Alton Jones."

Plaintiff's claim, that Cities turned away from the opportunity to participate in the Iranian oil industry and joined the conspiracy of the other defendants, was first raised by plaintiff in paragraph 10(i) of his original complaint, filed in 1956 (Tr. Vol. II, 55-62a). Under this claim, plaintiff urged from the outset that Jones was the man with whom he had dealt, who had personal knowledge of Cities' dealings concerning Iran and who logically should be examined first. As he had at the initial argument on the merits of Cities' motion, plaintiff's counsel in the next argument, on May 3, 1961, again pointed out that the central issue in the case was *whether* Cities conspired, not *why* it conspired, and that the man who should be produced for examination on that subject was Jones (Tr. Vol. III, 136, 141-42). In stressing the urgency of producing Jones, plaintiff's counsel noted that two of the officers at Cities with whom plaintiff dealt, Shaw and Whetsel, had already died and that an examination of Hill would only

prolong the time during which plaintiff was being kept from examining the people essential to his case (*id.* at 141-42). Thus, contrary to what Cities would have this Court believe, plaintiff has consistently alleged and argued his claim of conspiracy from the filing of the original complaint to this day. Under that claim, plaintiff repeatedly sought to examine Jones prior to his death.

Cities ignored plaintiff's allegations of conspiracy and concentrated on the Kuwait contract between Cities and Gulf and Cities' opportunity to participate in the Consortium. Plaintiff, however, did not limit himself to those two items of evidence, nor even to the threatened boycott against Cities at the American Petroleum Institute convention, nor to the fact that Cities, contrary to its apparent self-interest, rejected the opportunity to go into Iran, nor to the fact that Richfield, a Cities affiliate, had mysteriously refused to buy Iranian oil from him—all of which he testified about at his deposition (Tr. Vol. II, 114a, 118a; R. 5034). Again and again, plaintiff made clear his position, originally set forth in paragraph 10(i) of the complaint itself (Tr. Vol. II, 56a), that he expected more evidence of conspiracy to be forthcoming during discovery (Tr. Vol. II, 86a, 90a, 98a, 99a, 110a, 112a, 114a). But Cities would rather talk about Kuwait and Consortium, the two principal items of evidence which led plaintiff to sue Cities, as if plaintiff's case stands or falls on why he decided to sue and as if he were limited in his proof at trial to what he knew prior to discovery.

No citation to the record can support Cities' claim that Kuwait and Consortium were abandoned by plaintiff (Resp. Br. p. 24). Kuwait and Consortium remain as events whose implications and backgrounds must be developed on general discovery. In the meantime, the inference that they resulted or were promised when Cities adopted a course of conduct common to that of the cartel is as compelling as any contrary inference.

Similarly, there is no support for Cities' contention that plaintiff abandoned his consistent claim that Cities was acting pursuant to the conspiracy when, despite its keen interest in Iranian oil, it turned down the opportunity offered to it by plaintiff to manage the Iranian oil industry. Here, Cities endeavors to persuade the Court that plaintiff "abandoned" or "recanted" the "turnabout theory" (Resp. Br. pp. 32-33). According to Cities, plaintiff asserted, first, that Cities was interested in Iranian oil, then that Cities lost interest in Iranian oil, and, finally, that Cities never lost interest in Iranian oil. This misconstrues plaintiff's position. Plaintiff's consistent claim from the time of the original complaint in 1956 to this very day has been that Cities was interested in acquiring Iranian oil but that Cities gave up its chance to pursue that interest through the exploitation of plaintiff's contract with the Iranians and, instead, joined the conspiracy to boycott plaintiff and the Iranians.

Cities' final "theory" which it attributes to plaintiff concerns Richfield (Resp. Br. p. 33). As set forth in plaintiff's main brief, pages 20-21, plaintiff's negotiations to sell Iranian oil to Richfield Oil Corporation in 1953 had progressed to the point that samples of crude oil were flown from Iran to Richfield's laboratory for analysis. Richfield terminated these discussions suddenly and without explanation. Plaintiff has never contended, early or late, that the evidence in the present record proves that Cities ordered its affiliate, Richfield, to ditch plaintiff. What plaintiff has contended from the beginning of his case is that the Richfield incident was one of many incidents which demonstrate the existence of a boycott against plaintiff and that, before the court could even consider dismissing plaintiff's case against Cities, which owned one-

third of Richfield. (Tr. Vol. I, 112a) and placed several directors, including Jones, on its board (R. 10818), plaintiff should have had discovery in order to place all the facts before the court. It is no answer to say that the few Cities officials who were examined did not know much about Richfield. The place to begin the Richfield discovery is with Richfield.

Thus, Cities' effort to persuade the Court that plaintiff asserted, in sequence, a "Kuwait and Consortium theory" followed by a "turnabout theory" which was then replaced by a "Richfield theory" has no support in the record. Plaintiff's claim—conspiracy—has been consistent. It is supported by many facts, none of which have been abandoned. It is facts, not labels and theories, on which summary judgment motions must be decided.

III.

A. Reply to Point II of Respondent's Brief.

Cities asserts that "assuming every one of the factual assertions found in petitioner's brief is true," except the assertions concerning the role of Jan Sandberg, "there still remains no triable issue of fact. . . ." (Resp. Br. p. 49.) Thus, for purposes of this appeal, Cities concedes the facts set forth at pages 8-21 of Petitioner's Brief, which, as pointed out in Point III of that brief, require that Cities' motion be denied. Those facts are (1) plaintiff, through his contract with the Iranians, presented to Cities a unique opportunity to satisfy its chronic oil shortage; (2) Cities went to Iran, found the facilities in good condition and recommended a long-term arrangement with the Iranians which contemplated a major role for Cities; (3) Cities, acting in a manner which contravened its own

apparent self-interest and which furthered the interests of the Middle East oil cartel, refused to deal with plaintiff or the Iranians; (4) Cities actively interfered in plaintiff's efforts to sell oil under his contract; (5) during this period an invitation to join in the boycott of Iranian oil was published by Anglo-Iranian in the newspapers; (6) in the midst of his Iranian talks, Cities' top official, Jones, secretly visited Kuwait, where cartel members Anglo-Iranian and Gulf owned the oil concession; (7) Cities was specifically threatened with loss of its supplies if it did not toe the line; (8) Cities suggested to public officials that the cartel members, not Cities, were the proper parties to take over the Iranian oil industry; and (9) after announcing its support for the position of the cartel, Cities obtained a contract from Gulf to buy Kuwait oil.

The one lame attempt which Cities makes to avoid the impact of some* of the above facts is to assert that plaintiff's counsel in a brief in 1964 conceded that Cities did not conspire (Resp. Br. p. 54). Cities has taken the statement by plaintiff's counsel wholly out of context. The passage from plaintiff's brief in the district court, only one sentence of which is quoted by Cities, was addressed to the point that plaintiff was not yet able to pinpoint the precise date when Cities joined the conspiracy. This was the same point which counsel had earlier made to the court to illustrate the impossibility of setting forth "specific facts" under rule 56 in advance of full discovery (oral argument of May 27, 1963, R. 11823; Petitioner's Br. pp. 30-31). The sentences following the so-called concession, which Cities omitted in its quotation, reveal this to be the

* As mentioned earlier, pp. 2-3, Cities way of avoiding the impact of the threatened boycott at the American Petroleum Institute convention is to ignore it.

correct context in which counsel's comments were made.* The passage, with the sentences omitted by Cities in italics, is as follows:

> "Plaintiff does not claim that Jones was acting on behalf of a conspiracy when he sought the invitation, or when he went to Iran, or when he held his Tehran press conference, or when he wrote the conclusions to his final draft report on October 31, 1952 (Pltf's Ex. CS-119). *We cannot say when the first contact was made with him by those from whom he sought to conceal his trip to Iran because it was obviously hostile to their interests. We can only speculate, at this point, whether Jan Sandberg was the avenue of communication. We do have good reason to believe that the heat was on Jones at the time of the annual banquet of the A.P.I. in early November, 1952 (10422-5), and the fact seems to be that he held back and never did send out the final report of October 31, 1952 (Pltf.'s Ex. CS 119) to Mossadegh (10728).*" (Tr. Vol. II, 460-61a.)

Behind Cities' barrage of words about "concessions," "admissions" and "theories," lies one thought: that plaintiff must lose because he does not know the minutiae of the conspiracy. Merely to state the proposition is to refute it. If plaintiffs in civil antitrust actions were to be held to such standard of proof on the issue of conspiracy, especially on summary judgment motions prior to general discovery, they could never prevail, and the legislative policy favoring the private policing of the antitrust laws would be frustrated. The law is otherwise. The authorities are cited and discussed in plaintiff's main brief, pages 43-46. Far from imposing a strict standard of proof of the

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* To demonstrate fully the context in which the statement relied on by Cities was made, the entire point in the brief from which the statement was taken is set forth in Appendix A, *infra* pp. 31-33.

element of intent to conspire in civil antitrust litigation, the law is liberal in accepting circumstantial evidence, in recognition of the fact that the proof of conspiracy is invariably under defendant's control.

In Point II of its brief, Cities also attempts to demonstrate that it bowed out of the Iranian venture because of various findings in the proposed report to Mossadegh (Resp. Br. pp. 63-68). That attempt raises more issues of fact than it answers.

First, in quoting sections of the report entitled "Maintenance and Repair Material" and "Automotive Facilities," Cities wishes this Court to believe that one of the largest independent oil companies, contemplating a multi-million dollar operation, was thwarted by a need of a few trucks and spare parts. In fact, Heston's finding concerning equipment and spare parts was that:

> "* * * there would be a minor problem of getting repair parts and replacements but that where they could not be obtained, that the whole piece of equipment could be removed and replaced by American equipment. So that I didn't feel it would be any real problem." (R. 10921-22.)

Before Jones went to Iran, he informed Secretary of the Interior Chapman:

> "The wide experience of our organization in the production, transportation, refining and marketing of oil leads us to believe that we could successfully undertake the supervision of the rehabilitation and reactivation of the oil properties in Iran." (R. 10595, 10605.)

Heston admitted that nothing in the technical aspects of reactivation of Iran's oil industry caused Jones to change his mind (R. 10959). The suggestion that Cities turned

away for want of a few spare parts is nonsense. At most, Cities has raised a question for the jury.

Second, Cities misreads the proposed report to Mossadegh. Referring to the report's recommendation that the Iranians enter a long-term contract with "an American oil company" (Tr. Vol. II, 37a), Cities states in its brief (Resp. Br. p. 68):

> "The report is clear that Jones did not recommend this last-ditch alternative or regard it as a solution to Iran's problems."

Regardless of what Cities may consider "clear," this proposal is contained in the section of the report headed "Recommendations—W. Alton Jones" (Tr. Vol. II, 35-37a), and it is set forth in words that say:

> "If the deliberations of the above committee are unsuccessful in developing a satisfactory agreement, *it is recommended* that the National Iranian Oil Company endeavor to enter into a long term agreement with an American oil company to purchase Iranian crude oil * * *." (Tr. Vol. II, 37a) (emphasis added).

Cities cannot now escape the fact that Jones regarded a long-term purchase agreement with the Iranians as a workable proposal, both as a beginning to the solution of Iran's problem and as a solution to Cities' chronic need for oil, simply by denying that Jones recommended such an agreement and by calling it a "last-ditch alternative." Jones himself said he recommended it; whether it was "last-ditch" or not is for the jury to determine.

Cities' moment of high dudgeon comes with what it calls the "demonstrably false" assertion concerning Sandberg (Resp. Br. p. 49). As mentioned in plaintiff's main brief, page 13, Jones stopped on the way to Iran for five days of

secret conferences with Sandberg, in the midst of which he and Watson exchanged coded cables concerning the availability of tankers to lift Iranian oil. At his deposition in 1964, Watson admitted that Sandberg had "a position" with cartel member Royal Dutch/Shell (Tr. Vol. II, 425a). Cities now attempts to withdraw its officer's sworn admission.

Cities refers the Court to an alleged off-the-record incident between the witness and plaintiff's counsel shortly before Watson's admission was made and asserts that, in admitting Sandberg's connection with a co-conspirator, Watson was simply regurgitating what counsel told him (Resp. Br. p. 50). We deny these "facts" as earnestly as they are asserted. Plaintiff's counsel was not so naive as to tip his hand off the record in such a manner, nor was Watson so unthinking as to regurgitate such a telling admission against his company. The truth is revealed in Watson's answer. Though Cities asserts that Watson first learned of Sandberg's connection with Shell only a few minutes earlier, Watson said (Tr. Vol. II, 425a):

> "I do not know when I became familiar with his position in Royal Dutch Shell."

If he had been told a few minutes before, Watson would have known when he learned of Sandberg's position. Obviously, Watson did not learn this information from plaintiff's counsel, and Watson himself has never claimed that he did.

Cities' attorney's affidavit and the perfunctory affidavit of Sandberg deal only with formal employer-employee relationships and do not answer Watson's admission. The affiants passed up the opportunity to inform the court what

Jones and Sandberg talked about in Amsterdam as Jones was on his way to Iran and, again, on his return.

The Sandberg incident is a graphic example of the many sources of evidence which are foreclosed to an antitrust plaintiff when summary judgment is granted without general discovery. Such a decision can only create more issues than it settles.

B. Reply to Point III of Respondent's Brief.

Plaintiff takes no exception to the summary judgment cases cited by Cities (Resp. Br. pp. 69-72, 88-90). If anything, they emphasize the reluctance of the courts to grant summary judgment prior to the completition of full discovery and prior to the sworn denial of the wrongdoing alleged in the complaint. In each of them the moving party specifically denied or disproved, by officers or employees having knowledge of the facts, the allegations of wrongdoing contained in the complaint. This Cities has never done.

Cities' conclusory statement in its brief that it has denied the conspiracy is supported only by reference to the affidavits of Hill, who did not deal with the issue of conspiracy, and the affidavit of Cities' attorney, which was filed four years after the motion was made (Resp. Br. pp. 73-74). Such documents are not sufficient to satisfy the requirement of rule 56(e) that supporting affidavits shall be made on personal knowledge.

At places in its brief Cities seems to argue that it has obviated any need for denial of the conspiracy by furnishing what it considers to be proof of a nonconspiratorial motive for its actions (Resp. Br. pp. 20-21, 36-40, 62-68). It may be that an antitrust defendant can, in a proper case, negate the conspiracy by convincing proof of a non-

conspiratorial motive for its conduct without denying the conspiracy in so many words, although its failure to do the latter will aways be suspect. But if it wants to proceed in that manner, its proof, we respectfully submit, must be by affidavit by its officers or employees with knowledge, and supported by the entire record. Cities has never furnished such affidavits and support, although Jones was available to explain the facts at the time Cities moved for summary judgment. Such "proof" as there is in the record of a nonconspiratorial purpose for Cities' jilting of plaintiff consists of counsel's argument on the basis of selected passages from selected documents from Cities' files. And who but Cities itself selected these documents!

Moreover, plaintiff draws an opposite inference from the record. For instance, with respect to the Kuwait oil transaction, Cities suggests that its Operating Committee formally approved the contract before Cities became involved in Iran (Resp. Br. p. 20). Frame, chairman of the Operating Committee, admitted, however, that the Committee had no authority to act (R. 10458). Watson added that there were "still a lot of details on the Gulf contract to be worked out" at the time Jones was in Iran (R. 10646-47), and he assured Jones by cable that it was not necessary for Cities to commit itself on the Gulf contract until Jones returned from Iran (R. 10642). Regardless of whether there were significant changes in the Kuwait contract which benefited Cities after Jones returned from Iran, as plaintiff contends (Petitioner's Br. pp. 19-20), or no changes, as Cities contends (Resp. Br. p. 20), Cities was threatened with a loss of its supplies by the major companies at the American Petroleum Institute convention if it went into Iran. Cities stayed out of Iran, took a position supporting the cartel companies, and then was allowed to receive Kuwait oil.

The record thus strongly supports plaintiff's inference of conspiracy.

With regard to the Iranian Oil Consortium as subsequently formed, Cities claims it was not a conspirator because it received a lesser percentage of that Consortium than it hoped for (Resp. Br. p. 21). Watson testified that he and Jones contemplated a consortium of oil companies, including Cities, in Iran as early as August 1952 (R. 10572). Plaintiff was not permitted, however, to have discovery of the background of Cities' activities concerning an Iranian consortium (R. 10439, 10453-54), so that the issue of whether Cities' hope, or expectation, concerning its share in a consortium resulted from a promise by the other defendants as one of the inducements for Cities to join the conspiracy has been left unanswered.

Cities contends that the letters written by Jones to Secretary of State Dulles and Attorney General Brownell, in which Jones stated that "the only honorable solution" to the Iranian controversy was agreement with the cartel companies, were not proof of behavior conforming to the aims of the cartel because Jones enclosed copies of a legal opinion from John W. Davis with his letters (Resp. Br. p. 61). What Cities fails to mention is that Jones, in enclosing the Davis opinion, took pains to assure Dulles and Brownell that he had no intention of using its advice or revealing its contents to others! Jones stated to Dulles:

> "Please understand further that this opinion was not secured with the idea of supporting any contemplated action which I might take in the purchase of oil.
>
> • • • • •
>
> "There has been no general distribution made of this opinion and brief; in fact only Mr. Winthrop Aldrich, Mr. Herbert Brownell and yourself have received copies." (Tr. Vol. II, 394-95a.)

It is evidence of conspiracy—not the contrary—that Cities suppressed an opinion that purchasers of Iranian oil would have no legal difficulties in American courts and gave assurances that, in any event, Cities would not act on such advice.

Jones' letters to Dulles and Brownell plainly demonstrate Cities' adherence to the aims of the cartel, yet Cities relies upon them to prove the absence of a conspiratorial motive (Resp. Br. 31-32, 61). Certainly they raise yet another issue of fact. Moreover, if Cities is to be permitted to rely upon them to obtain summary judgment, plaintiff should be permitted discovery into the circumstances of their preparation and sending.

Cities' assertion (Resp. Br. p. 75) that the absence of testimony from Jones raises no inference of conspiracy cannot be supported by the record. Plaintiff had no chance to examine Jones: plaintiff's request to lift the stay of his discovery was opposed by Cities and denied by the district court in 1958 (R. 11159-63); his specific request to take Jones' deposition was opposed by Cities and denied in 1960 (Tr. Vol. III, 118; Vol. I, 69a) and again in 1961 (Tr. Vol. III, 136, 143); similarly, his request for full production of Jones' documents was opposed by Cities and denied in 1964 (R. 11762-72; Tr. Vol. I, 55-58a) and again in 1965 (Tr. Vol. I, 17a). The compelling inference is that Cities was afraid of what plaintiff would learn from Jones and his documents.

The contention (Resp. Br. pp. 75-77) that the Cities officials who testified were not subordinates and had the same knowledge as Jones concerning Cities' Iranian oil transactions is refuted by the witnesses' own testimony. They testified again and again that Jones was off on his own visiting Kuwait, Mossadegh, Sandberg, President Truman,

and others, and that Jones did not keep them informed as to his activities.*

Watson, the Cities official ranking next in importance to Jones, conceded just how little he knew:

> "Again I say I could not speak for Mr. Jones. He went over there on the ground and certainly he got himself in a much better position to judge all of the factors involved than I. His views might not have—although he never quarreled with me about it at all—but after he got back from Iran and discussed this thing generally with us, about his trip and all, frankly he did not take me into his confidence too closely. For instance, I never knew whether he sent this report in and I never went to Washington with him again when he did go down there to report to various places.
>
> Believe me, I am not accusing him of slighting me or anything of that sort, but I think he had the feeling he had the grasp of this problem much better than I did and carried it on himself pretty much." (R. 10730.)

Later Watson added:

> "Q. * * * Mr. Jones also speaks of extended conferences with oil executives. A. I have no idea who they were.
>
> "Q. You have not? A. He never talked to me about seeing Joe Doakes or any of these oil people and discussing the subject with them. He may very well have at API meetings, things of that sort, but I do not know the nature of those discussions, if he had them." (R. 10753.)

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* Indeed, Jones did not tell even his attorneys about the secret trip to Kuwait (see Resp. Br. p. 57). This fact illustrates why attorneys' statements and selected records cannot be accepted on motions for summary judgment. Full disclosure is necessary.

After testifying that he did "some sightseeing and a lot of waiting" during the five days Jones spent with Sandberg on the way to Iran, Frame added:

> "Q. What was the occasion for staying five days? A. Mr. Jones wanted to stay.
>
> "Q. Do you know what Mr. Jones was doing? A. Except seeing Mr. Sandberg, as far as I know, I know of nothing else.
>
> "Q. Well, how much do you know of how many times he saw Sandberg? A. I have very little knowledge of that.
>
> "Q. So you don't know what Mr. Jones was doing? A. That is correct." (R. 10348.)

As to the extent of his knowledge of what Jones was doing in Iran, Frame testified:

> "Q. Was Mr. Jones off negotiating on his own at this point? A. I don't think he was doing any negotiating, no.
>
> "Q. Was he off on his own? A. Sometimes.
>
> "Q. Do you know what he was doing when he was away from you? A. No.
>
> "Q. Did he report back? A. No.
>
> "Q. He did not discuss at night what transpired? A. No." (R. 10356.)

With respect to Jones' method of dealing with his subordinates in Cities, Frame testified:

> "Q. There was some humor yesterday about this point. Was this the nature of Mr. Jones, that he did what he did and he did it on his own, and you were staff and he didn't tell you any more than was necessary? A That's correct." (R. 10402.)

Heston, who was with Jones in Iran, had a similar lack of knowledge concerning Jones' secret trip to Kuwait:

"Q. Was there any discussion about you accompanying Mr. Jones to Kuwait? A. No.

"Q. To the best of your knowledge, did Mr. Jones go alone? A. I don't know.

"Q. Do you have any knowledge of who went with Mr. Jones, if anyone? A. No.

* * * * *

"Q. Did he tell you who he had seen. A. No.

"Q. With whom he had talked? A. No.

"Q. What he had said? A. No." (R. 10945-46.)

Hill, of course, knew nothing more about Jones' activities in Iran other than that he went there (R. 9902, 9880, 10035; see Petitioner's Br. pp. 24, 29). He also revealed the distance Jones kept between himself and Hill, the man Cities proffered as its witness:

"Q. I see. Then your answer is that Mr. Jones may have told you a fair amount but you don't recall it now; is that right? A. Not that I don't recall it. I am sure that he did not tell me he was writing to Mr. Dulles or to Mr. Parkhideh or to others. You just didn't go and ask Mr. Jones, 'What are you doing, Mr. Jones?' If he wanted to tell you, he would.

"Q. Did Mr. Jones tell you what he had done after he had done it? A. Not often." (R. 10034.)

Thus, not only were Hill, Watson, Frame and Heston subordinate to Jones, but they did not even know what Jones was doing, all of which makes overwhelming the inference that Cities had something to hide when it failed to produce Jones (see Petitioner's Br. pp. 56-57).

Cities' contention (Resp. Br. p. 80) that something more than conforming behavior must be shown to create an inference of conspiracy sufficient to defeat a motion for summary judgment is incorrect and, besides, is not to the

point, for the record shows much more than conforming behavior (see Point III of Petitioner's Brief). The authorities, holding that proof of conforming behavior having the effect of promoting the alleged conspiratorial purpose raises an issue of conspiracy for the jury, are set forth and discussed in Petitioner's Brief, pages 62-64. Indeed, the article cited by Cities (Resp. Br. p. 80) takes the position, contrary to Cities contention, that under certain circumstances parallel behavior alone "may reasonably be said to involve an element of agreement" in violation of the Sherman Act. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 HARV. L. REV. 655, 681 (1962).

Cities next argues that the lower courts did not relieve Cities of its initial burden to demonstrate the absence of genuine fact issues, as plaintiff says they did* (Resp. Br. pp. 81-90). That contention is refuted both by what the courts did and by what they said.

Judge Herlands could not have been more explicit in placing the burden on plaintiff when, in his final opinion, he said:

> "The single issue before the court relating to Cities' motion for summary judgment, is whether plaintiff's discovery has unearthed a 'genuine issue [of fact] for trial' where nothing had existed before but 'suspicion' and 'gossamer inference drawn from the mere sequence of events.'" (Tr. Vol. I, 10-11a.)

The district judge's pronouncement leaves no doubt that he thought plaintiff had the burden of demonstrating fact issues. Not only did Judge Herlands ignore the many issues of fact to which plaintiff directed him, but his rul-

* Cities idea of meeting its burden is to suggest that plaintiff should have performed the task for it (Resp. Br. p. 74).

ing that plaintiff had such burden conflicts with the authorities set forth in Point II of Petitioner's Brief. The court of appeals repeated the error:

> "Despite these more than ample opportunities to develop a basis for his action, plaintiff has been unable to do so, *and has failed to demonstrate the existence of any genuine issue of fact.*" (Tr. Vol. III, 176) (emphasis added).

The lower courts' treatment of the motion shows that they practiced what they preached. Nowhere in the district court's final opinion did it consider the complete absence of evidence from Cities on the question of whether it joined the conspiracy, as the court was required to do before turning to plaintiff's case. From one end to the other, Judge Herlands' opinion was a dissection of plaintiff's case. Cities' suppression of Jones' testimony was ignored.

Cities' assertion that the district court placed "an unusually heavy burden on it" is no answer (Resp. Br. p. 82). To support this assertion, Cities quotes a passage from an oral argument but fails to mention that the argument occurred on May 9, 1960, three years before rule 56(e) was amended (Resp. Br. pp. 82-83). After the amendment, the courts below proceeded consistently on the assumption that plaintiff, not the moving defendant, was required to demonstrate the absence of genuine issues of of fact (Petitioner's Br. pp. 53-55).

Cities is grossly mistaken when it says that plaintiff did not argue below that Cities had the burden of demonstrating the absence of any genuine issue of fact (Resp. Br. pp. 72, 81). In his very first brief in opposition to Cities' summary judgment motion in 1960, plaintiff argued that

Cities had not sustained the burden of negating the conspiracy. Point II of that brief was entitled:

> "The Motion Is Defective"

and the first subheading was entitled:

> "(a) The documentary evidence does not negate plaintiff's claim that Cities was bought off by Gulf and Anglo-Iranian."

Plaintiff preserved his position throughout. When, on May 27, 1963, during oral argument on Cities' motion the district court drew the attention of counsel to the new amendment to rule 56(e) (R. 11802), plaintiff's counsel emphasized his position that the amendment was not intended to alter existing standards under rule 56 nor to cut off a plaintiff's right to examine (R. 11826). In a memorandum filed in opposition to Cities' motion on August 16, 1963, plaintiff, after reviewing the facts, put the issue as follows (at 41-42 of said memorandum):

> "Can we really say with any conviction that Cities Service has demonstrated the absence of any dispute as to the material issue of whether Cities Service conspired to boycott plaintiff?"

Finally, in his brief in the court of appeals, plaintiff discussed and distinguished the cases which Cities relied upon to justify the district court's action under rule 56(e), including *Dressler* v. *M.V. Sandpiper,* 331 F. 2d 130 (2d Cir. 1964); *Scolnick* v. *Lefkowitz,* 329 F. 2d 716 (2d Cir. 1964); and *Schwartz* v. *Associated Musicians of Greater New York, Local 802,* 340 F. 2d 288 (2d Cir. 1964), which Cities cites to this Court as authority supporting the grant of summary judgment under the amendment to rule 56(e) in this action (Resp. Br. pp. 69-70, 85, 90).

C. Reply to Points I and IV of Respondent's Brief.

Cities contends in Point I of its brief that, if plaintiff has not had general discovery, it is plaintiff's own fault. In Point IV, Cities asserts that, in any event, plaintiff was given enough discovery.

Cities begins by suggesting that Judge Weinfeld's order in 1956 by which plaintiff was forbidden to engage in discovery was fashioned after an "accepted practice" in the Southern District (Resp. Br. pp. 2-3). Judge Weinfeld's response to the same suggestion by Cities' counsel in another case was:

> "There is no 'generally accepted' policy or practice in this District (as described in defendants' brief) 'of extending a defendant's time to move against or answer the complaint in a private treble-damage antitrust suit until after he has completed the taking of a plaintiff's deposition * * *'." *Ideal Pictures, Inc.* v. *Films Inc.*, 190 F. Supp. 433, 434 (S.D.N.Y. 1961).

It is unthinkable that any court would have a practice or policy sanctioning an eleven-year stay of discovery against a party.

Cities next attributes to plaintiff every single delay and adjournment in the action since 1956 (Resp. Br. pp. 4-12). While the question of who requested adjournments is hardly dispositive of the issues before this Court, the effects of an eleven-year stay of discovery should not be placed at plaintiff's feet by saying that he asked for the time when in fact he did not. To correct this impression, it is necessary to respond in detail:

> 1. Cities states that during the first year of depositions all the adjournments were at petitioner's

request or consent and that, "The record reveals none requested by defendants." (Resp. Br. p. 3.) The portions of the record cited at page 3 of Cities' brief in support of that statement in fact reveal that three of the six cited adjournments were requested by defendants, not plaintiff (R. 337, 656, 2110); one was requested by plaintiff, due to illness (R. 1621); and the record is silent as to who requested the remaining two (R. 1372, 3182).

2. Cities states that the deposition schedule which followed plaintiff's futile motion for a protective order was postponed "at petitioner's insistence" (Resp. Br. p. 4), but the stipulation cited (Tr. Vol. IV, 224) does not reveal who requested the postponement.

3. Cities prides itself on its 3½ day examination of plaintiff (Resp. Br. pp. 4, 7, 16, 21, 74), but it neglects to tell the Court that plaintiff had been examined again and again on every aspect of his case by six other defendants over 91 deposition sessions attended by Cities, covering 6,056 printed pages and over 1,000 documents, before Cities took up the campaign.

4. Cities chides plaintiff for delaying the service of his amended complaint, yet the referenced stipulation recites that the delay occurred "At the request of counsel for Cities Service." (Tr. Vol. IV, 259.)

5. Cities accuses plaintiff of "delaying tactics throughout his discovery of Cities" (Resp. Br. p. 10), yet the passages which follow refer to a delay in Hill's deposition occasioned by an application by defendant Standard Oil Co. of California to place certain documents produced by Cities under seal of the court (Resp. Br. pp. 10-11).

6. Cities attributes to plaintiff the delays which occurred during defendants' examinations of non-

> party witnesses (Resp. Br. p. 9) when, in fact, defendants noticed those depositions and were responsible for their length. Indeed, plaintiff moved to vacate defendants' notices of those depositions in 1958 and asked to commence his own discovery. The court, however, denied plaintiff's motion and required him to wait until defendants completed their examinations of these nonparty witnesses before permitting plaintiff to commence the limited discovery afforded him. As a result, plaintiff was forced to wait a year before examining Hill on the two issues prescribed by the court, and, in the meantime, Jones died.

Cities' suggestion (Resp. Br. pp. 4, 44-45, 90) that the deposition schedule could have been completed in one year is nonsense. Lawyers and litigants are not required to work every day on one case to the exclusion of all their other responsibilities. The point is that plaintiff should not have been stayed from all discovery throughout the three-year period taken up by plaintiff's deposition much less the three additional years which defendants used to examine nonparty witnesses.

Cities next claims, for the first time, that plaintiff has not been stayed at all during the past five years. The argument which seems to be made, albeit hesitantly, is that Judge Herlands' order of February 11, 1958 (R. 11157), superseded Judge Weinfeld's order of July 11, 1956 (R. 11045) (Resp. Br. pp. 4-6, 45).

Until now, even Cities has recognized that the denial of a motion to terminate a stay leaves the stay in effect. This position has been accepted by every party in the case, *including Cities.* In its brief to the Court of Appeals, Cities, in reviewing Judge Herlands' order, stated (at S-4 of said brief):

> "By their detailed review of the conduct of the litigation up to that point, defendants satisfied Judge Herlands that the procedure adopted by Judge Weinfeld was not only suitable *but should be continued* * * *." (Emphasis added.)

Again, on page S-1 of the same brief, Cities stated that Judge Herlands' 1958 order *"continued the procedure established by Judge Weinfeld."* (Emphasis added.)

The reason why Cities and the other parties have heretofore regarded the stay of discovery to be still in effect is plain: it is still in effect. Judge Weinfeld's order stayed discovery until after defendants answered; defendants were not required to move or answer until after they completed discovery. When defendant's discovery was completed in May 1962, defendants other than Cities prepared a motion to strike portions of the complaint. In order "to save the Court and all parties unnecessary work," plaintiff agreed to amend his complaint. (Tr. Vol. IV, 256) and gave copies of the proposed amended complaint to defense counsel on June 15, 1962. Cities then asked plaintiff to adjourn the schedule for amending the complaint until the examination of Cities was complete (*id.* at 259). Plaintiff agreed (*ibid.*). Rulings on objections to questions at Hill's deposition were made on April 22, 1963 (Tr. Vol. III, 15). Plaintiff then moved for further discovery of Cities, and Cities renewed its summary judgment motion. Argument was held on May 27, 1963 (R. 11781). On July 12, 1963, plaintiff filed his amended complaint (Tr. Vol. III, 15). In November 1963, the other defendants addressed two motions to the amended complaint (*id.* at 16). The first, a motion to dismiss and for summary judgment, was denied on June 23, 1964 (Tr. Vol. I, 21a). The second, to strike a portion of the amended complaint, was withdrawn on November 5, 1964 (Tr. Vol. IV, 286-88), and

defendants' time to answer began to run (*id.* at 289). Before the time to answer expired, however, plaintiff died, and Judge Herlands stayed all proceedings to await a motion to substitute plaintiff's executrix as the party plaintiff (*id.* at 290-91). The motion to substitute was granted on February 9, 1965 (*id.* at 291), and final argument on Cities' motion was held the same day (Tr. Vol. III, 144). At the end of the argument, Judge Herlands stated that other matters, including the remaining defendants' time to answer, would await disposition of Cities' motion (*id.* at 170-71). On September 8, 1965, the motion was granted (Tr. Vol. I, 5a), and plaintiff thereupon commenced this appeal (*id.* at 161a). The remaining defendants then took the position that further proceedings, including their answers, should await a determination of the appeal (Tr. Vol. IV, 292-94). Thus, at no time since the commencement of this action eleven years ago have defendants been required to answer. At all times during that period, therefore, plaintiff has been stayed from discovery.

Even more significant, however, is the fact than on no less than four occasions plaintiff has specifically requested Judge Herlands to allow him to have discovery of the remaining defendants (R. 11049; Tr. Vol. IV, 272; Tr. Vol. III, 118; R. 11799; Tr. Vol. I, 126-27a). Each of these requests was denied. Since his specific request for discovery of other defendants was denied four times by the judge assigned to the case for all purposes, plaintiff was hardly "entitled to proceed to conduct general discovery," as Cities suggests (Resp. Br. p. 5).

Cities' final point is that plaintiff was afforded adequate discovery (Resp. Br. pp. 90-96). The feeble attempts to find some justification for the district court's severe restrictions in time and scope of plaintiff's discovery refute themselves. Nothing can gainsay the fact that Judge

Herlands' orders limiting plaintiff's discovery effectively denied plaintiff his day in court and, particularly in view of the burden imposed on plaintiff, prevented him from getting at the detailed facts he was required to specify (see Petitioner's Br. pp. 42-49).

When Cities suggests that discovery under rule 56(f) should be narrower than that permitted under rule 26 (Resp. Br. pp. 46-47), it is mistaken. It may be that, in a proper case, where the motion is based on a limited defense such as payment, release or the statute of limitations, then the discovery necessary to meet that defense might be correspondingly limited under rule 56(f). But where, as here, a defendant who, together with the co-defendants, has control over plaintiff's proof moves for summary judgment on the ground that plaintiff's case has no merit, then, in order to meet that contention, plaintiff must be given an opportunity for discovery which is sufficient to enable him to prove his case. The only rule which sets forth the framework of discovery of that type is rule 26.

Cities' concluding remarks concerning the cost of litigation (Resp. Br. pp. 96-97) are particularly ironic. It is likely that this Court has never been presented with a more striking example of the means by which powerful corporate defendants can run roughshod over individual antitrust plaintiffs. This case has already earned the reputation as being the classic example of abuse of the discovery process. 4 MOORE, FEDERAL PRACTICE § 26.13[2], at 1151-52 (2d ed. 1966).

To suggest, as Cities does, that plaintiff wants "a permanent license to conduct an investigation of Cities" (Resp. Br. p. 96) is nonsense. Plaintiff, as he made clear in 1958, in 1960, in 1961, in 1963 and in 1965 when he requested Judge Herlands to permit him to have discovery of the defendants, wants nothing more than the oppor-

tunity to exercise his right to prepare and try his case like any other federal litigant. The fact that he has brought an antitrust claim against large corporations should not defeat that right.

Conclusion

The judgment dismissing the complaint as to Cities should be reversed and the action should be remanded to the district court with directions to deny Cities' motion for summary judgment and permit plaintiff to engage in discovery proceedings to the full extent permitted by the Federal Rules of Civil Procedure.

Respectfully submitted,

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APPENDIX A*

Point III of Plaintiff's Reply to Cities Service's Submission in Support of Its Summary Judgment Motion, November 4, 1964.

III.

According to Cities, "The Public Statements made by Mr. Jones do not justify any inference that Cities Service mysteriously changed its views or joined a conspiracy."

The argument here, if we understand it correctly, is that plaintiff's case now stands upon public statements to the press which Jones made in Tehran in September, 1952, just before his return to the United States (Pltf.'s Ex. CS-108), that Jones never changed the views that he expressed on that occasion, and that his expression of them in public is inconsistent with any participation by him in a conspiracy directed against Iran.

We should, perhaps, point out that what Jones is quoted as having said at the press conference is perfectly consistent with an intention on his part to run the Iranian oil industry with or without British cooperation in transportation and marketing. It would have been a bigger show with British cooperation than without, and if Jones said what Frame and Watson, who were not there, say he said to Mossadegh about the advisability of securing British cooperation (10365, 10714), he laid the groundwork for the bigger show. By saying in public that he was not particularly worried by British threats, he conveyed to the British his intention to run the operation

* See page 10.

with or without their cooperation. Everything that he said on that occasion makes complete sense and can be easily understood when considered in the light of Watson's "Secret-Draft-Secret" memorandum of August 8, 1952, written before Jones went to Iran (Pltf.'s Ex. CS-94), and Jones' final draft report to Mossadegh of October 31, 1952, written after Jones returned from Iran (Pltf.'s Ex. CS-119).

We do not deny that one inference to be drawn from Jones' remarks to the press in Tehran on September 18, 1952, if one is to proceed on inferences where summary judgment is sought, is that the remarks appear to be a kind of declaration of independence inconsistent with the captive status of a conspirator. That would only mean, in our judgment, that Jones had not yet fallen off the fence. Plaintiff does not claim that Jones was acting on behalf of a conspiracy when he sought the invitation, or when he went to Iran, or when he held his Tehran press conference, or when he wrote the conclusions to his final draft report on October 31, 1952 (Pltf.'s Ex. CS-119). We cannot say when the first contract was made with him by those from whom he sought to conceal his trip to Iran because it was obviously hostile to their interests. We can only speculate, at this point, whether Jan Sandberg was the avenue of communication. We do have good reason to believe that the heat was on Jones at the time of the annual banquet of the A.P.I. in early November, 1952 (10422-5), and the fact seems to be that he held back and never did send out the final report of October 31, 1952 (Pltf.'s Ex. CS-119) to Mossadegh (10728).

If Jones lost his independent status at about the time of the A.P.I. convention in November 1952, the elaborate argument which Cities makes in its final point has only

momentary significance from Cities' point of view; it can be taken to infer only that up to September 18, 1952, Jones was still a free agent. On the other hand, it reinforces plaintiff's argument that Jones recognized and reached for an opportunity of breathtaking proportions, and still had his grasp on it as late as September 18, 1952.

Much more could be said about Cities' Submission but surely no more is necessary to demonstrate that it will not support a motion for summary judgment.